IN THE

Supreme Court of the United States

October Term, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS RUSSELL ALLEN, ET AL.

The respondents have made brief reference in No. 874 (as petitioners) concerning the private record and collusive nature of the case of *Cranston v. Freeman,* 290 F. Supp. 785 (1968). In view of the fact that extensions of time for the filing of appellees' briefs in *Cranston,* granted on March 26, 1969, will preclude a final decision by the Second Circuit before this Court acts herein, it is deemed advisable to inform this Court of a few of the factors involved in *Cranston,* the following matters being illustrative rather than exhaustive of the objectionable matters in the *Cranston* suit.

Although that opinion states that two non-nearby dairy farmers (Leonard Duncan and Kenneth Hewitt) charged that the *Cranston* suit had been solicited by the Connecticut Milk Producers Association (CMPA), composed almost entirely of nearby producers, the said applicants for intervention actually charged that Connecticut nearby interests and attorneys involved in both *Blair* and this suit were involved in such solicitation. The record discloses that Attorney Frederick Conard, Counsel for CMPA and the nearby producers in the *Cranston* case, met with a former CMPA official concerning the contacting of the prospective plaintiff Cranston for the purpose of instituting the *Cranston* suit. This occurred shortly after the granting of the preliminary injunction on January 16, 1967, in this case and was obviously to preclude the filing of a suit in the District of Columbia in respect to the Connecticut nearby differential. In fact, the record in *Cranston* discloses that another non-nearby producer (Alexander Marbot) was solicited to bring such a suit in the District of Connecticut prior to the solicitation of Mr. Cranston, and that individual was not re-contacted after he informed that he wished to consult his attorney concerning such a suit. The former CMPA official (John Seremet) who contacted plaintiff Cranston freely admitted that he contacted Cranston for the purpose of instituting a suit, and he positively did *not* testify that he "had heard rumors" that Cranston intended to commence a suit, as stated in the *Cranston* opinion. Moreover, this individual knew of no meeting of the CMPA that preceded or authorized his contacting of Mr. Cranston, although he did testify that Attorney Conard previously gave him the name of an attorney to represent the prospective plaintiffs prior to the contacting of Cranston. Although the *Cranston* opinion states that the CMPA "checked out" the *Cranston* plaintiff's present attorney because they wanted "good attorneys on both sides of the question", the record discloses that it was opposing counsel Conard that checked

out plaintiffs' attorney, and the *Cranston* opinion fails to note that the attorney initially recommended by Attorney Conard to act as plaintiffs' counsel had no experience in the specialized field of milk marketing litigation. Additionally, the record reflects that the prospective plaintiffs were not allowed to consult their present attorney for the purpose of instituting the *Cranston* suit until after opposing counsel Conard checked out Cranston's present attorney. The *Cranston* opinion fails to note that Attorney Conard was associated with petitioners' counsel in this suit and the *Blair* case on the side of the nearby producers and nearby differential, and that every attempt has been made in this suit to preclude the presentation of the non-nearby producers' case, including appearance in court on various matters with little or no notice to opposing counsel and attempts to prejudice the non-nearby producers by improper financial pressures – such as refusal to print relevant portions of the record and efforts to force non-nearby producers to bear an unfair part of the expenses of the nearby producers' appeal. In view of the fact that the CMPA is admittedly acting in the names of the individual nearby producers in both this case and the *Cranston* case, it is submitted that the contrasting treatment in the two cases does not support the statement in the *Cranston* opinion that the payment of expenses and attorney fees of opposing counsel in *Cranston* is attributable to the fact that the CMPA is a "democratic" organization. Additionally, Attorney Conard has vehemently opposed the entry of any unselected non-nearby producer or unapproved attorney into the *Cranston* case, and no non-nearby dairy farmer has been able to intervene therein even for the purpose of taking depositions or discovery.

The *Cranston* opinion also fails to note that at least 90 percent of the non-nearby dairy farmers who became aware of the factors permeating the *Cranston* suit requested its dismissal. The plaintiff Cranston admitted

that he had not advised any other producers of that suit, either prior or subsequent to its institution, and the opinion fails to indicate such fact or that Mr. Cranston sold his cows after the trial and retired from the dairy business. The *Cranston* opinion states that the CMPA decided to "aid" its members by "reimbursing such members for reasonable expenses and attorney fees", but all four of the individual plaintiffs testified that they had no liability for either expenses or attorney fees and reimbursement therefor can hardly exist under such circumstances. Moreover, a large number of cancelled checks from non-nearby producers to applicants' attorney evidenced that such "aid" was not only unnecessary but unwelcome under the undisclosed arrangement. Non-nearby dairy farmers who were unaware of even the pendency of the *Cranston* suit could hardly be receptive to such a financial arrangement that was not communicated to them.

The *Cranston* opinion (footnote 2) states that the court's Order of April 22, 1968, set forth that "the complete record of those proceedings *has been deposited* in the chambers of the United States District Judge, located in the Federa! Building, Albany, New York. The record *is* available for public inspection during normal business hours." The record had been continuously located outside of the Northern District of New York at New Haven, Connecticut, and applicants' attorney traveled from Washington, D.C., to Albany, N.Y., on May 2, 1968, to inspect said record in preparation for the hearings on collusion after Department of Justice attorneys refused applicants' counsel the courtesy of reviewing their record in Washington. He was informed, after persistent inquiry, that the record was not at Albany, N.Y., and that its whereabouts were unknown. He again traveled 800-miles round trip for said purpose and finally was able to look at the voluminous record for 25 minutes, the unavailability of an Ass't. U.S. Attorney to watch

counsel as he examined the record precluding any further review. In view of these facts, it is difficult to comprehend how a court order could state that a voluminous record was presently located at a particular location when it had not been sent to such designated place, and it is equally difficult to understand the statement in the *Cranston* opinion that all who desired to examine such record could do so and that no prejudice resulted from the delay in shipping the record to Albany, N.Y. In this connection, the applicants were never accorded the opportunity to even inspect the parties' briefs in *Cranston*, although the parties were allowed to respond to a brief submitted in *Cranston* by an applicant for intervention.

Although the *Cranston* opinion states that all aspects of the claim of collusion were explored and every interested person given an opportunity to be heard, the applicants for intervention who sought dismissal of the *Cranston* suit were not allowed to take depositions or discovery, and they could not examine any of the parties or counsel in *Cranston* without making the same their own witnesses. They were not allowed to ask any questions of a witness concerning the merits of the case, even to illustrate the inaccuracy of the testimony of such witness, and the court repeatedly interrupted applicants' counsel and actually threatened counsel with contempt when he sought to explain the nature of an objection in a quiet and respectful manner. The futility of proceeding further in the hearings was apparent to every non-nearby dairy farmer, and most of them decided that it was meaningless to even return to the courtroom. Both applicants and their counsel were at all times completely respectful and non-argumentative, but the collusion hearings were simply "an alternative" to the depositions and discovery that had been requested for five months in *Cranston* and resulted in inability to develop the facts in a normal manner.

The Notice of said hearing failed to advise dairy farmers of the matters alleged by applicants for intervention and was actually a show cause order that was worded in such a manner that it could only serve to dissuade any dairy farmer from challenging the *Cranston* suit. Such farmers had to take the stand subject to cross-examination but the attorneys were not even required to submit a signed statement to the Court, and no question was asked of Attorney Conard or any of the parties by the district court. The applicants' main witness testified for 14 pages of the record but was cross-examined for 54 pages of the record. The president of the CMPA, Louis Longo, who owns a large "nearby" farm in Connecticut, testified for 33 pages of the record for the parties, but the applicants' counsel was interrupted after 5 pages of cross-examination and asked how much longer he was going to take. The hearings on collusion did not adequately treat this subject, and the applicants advised that important witnesses were outside the jurisdiction of the court. The district court had also required the applicants to submit the names of all intended witnesses and its order provided that it would determine if their presence was necessary after objection thereto by the parties, the said Order further providing that the court would question the witnesses in the first instance. The hearings disclosed that two of the six individual plaintiffs did not even know that they had been listed as plaintiffs, and one such listed plaintiff was unable to identify the plaintiffs' counsel in *Cranston*.

Although the plaintiffs' counsel in *Cranston* presented no witnesses, other than the minimal testimony of the four plaintiffs, the plaintiffs did not file any motion for summary judgment or even a motion to hold that case in abeyance pending a decision on the *Allen* appeals. Copies of both motions and the *Blair* and *Allen* briefs were furnished to the *Cranston* plaintiffs.

The *Cranston* opinion refers to a "meeting between CMPA officials, plaintiffs and Attorney Weatherwax" that occurred on February 3, 1967, but it fails to note that Attorney Conard and Louis Longo, CMPA president who owns a large "nearby" farm, traveled from Hartford, Connecticut, to the home of Cranston at Troy, N.Y., on February 3, 1967, and transported the three prospective plaintiffs to Attorney Weatherwax's office for their first consultation concerning the institution of the *Cranston* suit.

The *Cranston* opinion refers primarily to the CMPA but the complaining dairy farmers in *Cranston* alleged that the suit was conceived and instigated by the same attorneys that represented the nearby interests in *Blair* and this case. They further alleged that the "trial" in *Cranston* was for the purpose of overcoming the admissions in *Blair* that the "market differential" was correctly defined in the Congressional Reports and could not formulate a basis for the issuance of the nearby farm location differential. The only witnesses who testified in *Cranston* in this regard were Attorney Reuben Hall, who was associated with Attorney Conard and petitioners' counsel in *Blair* and this case as counsel for the CMPA and NEMPA, personnel from the USDA, and the witness Kane. The latter's testimony rested upon a 1935 draft of proposed revisions to the Act that was never produced to substantiate his testimony because of the obvious inconsistency between his testimony and said draft. (App. C, pp. 12-21c). The testimony of the other witnesses that attempted to cast doubt on the Congressional definition of the market differential can only be viewed as fantastic, in that the defined market differential admittedly existed in the very area of the *Cranston* trial both prior and subsequent to federal regulation. (App. C, pp. 22-23c). In spite of this fact and the presence of the market differential in both the Connecticut and the Mass.-Rhode Island milk orders as a part

of the zone differential, 7 C.F.R. 1015.62, 1001.62, the *Cranston* opinion fails to recognize that the market differential is included in said orders, and the decision rests on the incredible testimony of such interested attorneys and governmental personnel who allegedly "knew of no differentials which would in any way fit the definition of market differentials contained in the reports." The trial in *Cranston* also replaced the administrative record testimony which indicated that the nearby differential did not exist prior to the 1937 federal regulation and was thus not "customarily applied" by handlers as required by the language of the Act pertaining to the market differential. (App. C, pp. 24-30c). In this connection, it is noted that Attorney Weatherwax filed a brief for 24 handlers or dealers in the 1956 N.Y.-N.J. administrative hearings that dealt solely with the market or direct-delivery differentials payable in the secondary markets of Upstate New York, but said brief was never introduced in the *Cranston* trial to rebut the testimony that the market or direct-delivery differential did not exist in such secondary markets.

Moreover, the government not only presented testimony by USDA personnel that was in direct contradiction to the admissions made in *Blair* but also failed to produce various relevant documentary evidence because the same would conflict with such testimony concerning legislative intent and other matters. The 1935 draft referrred to by the witnesses Kane and Hall is one example, and the memoranda of the AAA set forth in Appendix C, pp. 9-12c, is another example of an AAA statement concerning legislative intent that conflicts with the testimony in *Cranston*. The latter memoranda refer to Sec. 8c(5)(D) that provides for the only exception to the requirement of payment of a uniform price to all producers irrespective of the use of their particular milk. Petitioners have made reference to Circuit Judge Jerome Frank's interpretation of certain irrelevant parts

of the Act, but they have neglected to produce various memoranda from the government's files concerning AAA interpretation of the relevant portions of the Act, such as the following from a memorandum from Assistant Chief Abe Fortas, Marketing Agreement, Code & License Section, to AAA General Counsel Jerome Frank on October 31, 1934:

> "It should be noted that milk licenses contain a provision which allows new producers Class III price for milk during a probationary period of ninety (90) days. This provision, however, furnishes no precedent for the proposed exclusion of certain producers from a market. In the first place, the present provision does not exclude the producer but merely specifies that he shall be paid the Class III price. In the second place, the producer is certain that, regardless of any other circumstances, after he has operated for ninety (90) days, he will be able to market his milk upon the same terms as any other producer. * * *."

Numerous other examples could be given of such conflicts in the testimony in *Cranston* and the early interpretations of the Act by the AAA, and it is noted that the *Blair* brief admitted a construction of the Act that varies from the *Cranston* testimony. (App. C, pp. 14-15c). The *Cranston* plaintiffs have repeatedly delayed in prosecuting their appeal in the Second Circuit, thus preserving an alleged conflict of sorts, although the petitioners' counsel previously argued that this case and *Cranston* were completely different when intervention was sought in *Cranston* for the purpose of holding that suit in abeyance.

Respondents do not propose to treat in detail the various objectionable factors of the *Cranston* case in this brief, and the inaccuracy of the *Cranston* record and decision on the merits is illustrated in other briefs filed herein. However, the appendix hereto sets forth some

of the relevant testimony in *Cranston,* and it is respectfully maintained that said case is not only improperly cited herein as a basis for granting of a writ of certiorari but is not maintainable at all under this Court's decision in *Gardner v. Goodyear,* 131 U.S. Appendix ciii, because of the collusive aspects thereof and the private nature of the proceedings, irrespective of whether said case was truly contested in the district court. The respondents respectfully submit that the opposition may not select the plaintiffs, approve opposing counsel, authorize institution of the suite, and agree to pay all expenses and attorney fees of the opposition without being held to have such control over the suit as to make it merely collusive as a matter of law. The failure to advise other dairy farmers of its pendency until 15 months after its institution and after all proceedings have been concluded merely serves to emphasize the private nature of the proceedings and underscores the certainty of payment by the opposition.

CONCLUSION

The *Cranston* district court decision is not a proper basis for the granting of a writ of certiorari, and the petitions herein and in No. 1076 should be denied.

Respectfully submitted,

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EDWARD J. RYAN,
JOHN J. SIMARD,
Counsel for Respondents.

April, 1969

APPENDIX OF PORTIONS OF HEARINGS IN *CRANSTON v. FREEMAN*

May 15, May 27 and June 10, 1968

APPENDIX

Although the motion for a preliminary injunction in this case was strongly opposed by the government and the CMPA and NEMPA, applicants for intervention as defendants in the district court that were represented by Attorneys Conard, Hall, and ~~Respondents~~ Petitioners' counsel, the record in *Cranston* reflects that Attorney Conard consented to such injunction and escrow order in that case. The following is an excerpt from the Memorandum-Decision of Judge Foley of the U. S. District Court for the Northern District of New York in granting the motion for preliminary injunction in *Cranston*:

> "* * * Moneywise, a significant factor favoring the injunction is that the attorney for the intervening defendants, permitted by grant of formal motion to so intervene on March 2nd, unqualifiedly stated at the hearing on that date he would not have any objection to the signing of the preliminary injunction. Interestingly, it is these intervening defendants from whom the payments or credits will be withheld by the injunction order. Although the government earnestly argues distinguishability, I think there is enough similarity – at least upon the law and orders involved – with the *Blair* ruling adverse to the Secretary, from which certiorari was not sought, to satisfy the probable success requirement. * * * ."

Although the government and the aforesaid counsel for applicants for intervention strongly questioned the maintenance of this suit as a class action and insisted that 6,600 non-nearby producers located in three or four states were indispensible parties, it is noted that only the government opposed the maintenance of the *Cranston* suit as a class action and government counsel subsequently withdrew such objections only in the *Cranston* case:

> "THE COURT: Does the Government wish to be heard?

MR. KRAUSE: Your Honor, we do not intend to present any evidence on this subject, and we have no objection to the maintenance of the class action, either on behalf of the plaintiffs or on behalf of the defendant-interveners. * * * ."

THE COURT: Well, as far as the Order, and I frankly do think we are at the point where the Court should comply with the rule and enter an Order –

MR. KRAUSE: As I say, we have no objection to that." (R. 1164; T. 299-301).

In respect to notification of other dairy farmers concerning the *Cranston* suit, the plaintiff Cranston testified as follows on May 27, 1968, concerning the institution of that suit on February 9, 1967:

"Q. What other producers did you actually talk to *before* you instituted this case, concerning the institution of this case? A. I don't recall that I talked with any others than I have mentioned regarding the institution of the case. * * * (other two plaintiffs)

Q. Now, *after* the institution of this suit, what producers did you then contact and advise of the pendency of this suit? A. Mr. Ottman, Mr. Phillips and Mr. Mesick.

* * * *

Q. And Mr. Ottman, Mr. Phillips and Mr. Mesick are in the 23-cents zone, which is different from the zone that the initial three plaintiffs were in; are they not? A. This is correct.

Q. And they were subsequently added as plaintiffs to the case by an amended complaint? A. Yes, sir."

The individual plaintiff Mesick testified as follows on May 27, 1968, in the *Cranston* collusion proceeding:

"Q. Can you tell me whether you had knowledge of your being a plaintiff in this particular action? A. Not until the other day.

Q. Now, your testimony is that you did not know, until the other day, that you were a plaintiff in this particular action? A. That is correct.

Q. And can you identify Mr. John P. Weatherwax for me, please? (plaintiffs' attorney) A. I could not, other than since I came into this courtroom I realized where Mr. Weatherwax is sitting.

Q. And your name is, however, listed as an individual plaintiff in this action, representing a class of other dairy farmers? is that correct? A. Well, apparently.

* * * *

Q. In other words, you discussed this with Mr. Ottman, who is also listed as a plaintiff in this case? A. Yes.

Q. And he was also unaware of this fact? A. This is correct.

* * * *

Q. In other words, you never authorized your name to be affixed to any of these pleadings as a plaintiff; is that correct? A. No; I certainly did not.

* * * *

Q. Had you ever met Mr. Weatherwax or did you know him before this day? A. To the best of my knowledge, no."

The plaintiffs' attorney in *Cranston* testified as follows concerning the foregoing testimony of Mr. Mesick:

"Q. Now, have you ever spoken to either Mr. Mesick or Mr. Ottman concerning this action? A. Personally?

Q. Yes. A. No."

The transcript of the trial itself discloses the following at pages 118-119 concerning the non-appearance of Ottman and Mesick at the trial:

"MR. WEATHERWAX: The Court please, I had anticipated named plaintiffs Roy Ottman and George Mesick, Jr., would be here to testify today, but both have illnesses in their homes and were unable to be here. So I have just verified that fact, so I will not be able to produce their testimony today, and I will not produce it at any time, for that matter, as I feel perhaps that the testimony of the other named plaintiffs will probably be sufficient for the purposes for which their testimony was offered.

THE COURT: That is Ottman and Mesick. Those are the two plaintiffs you mentioned?

MR. WEATHERWAX: Yes. * * * ".

The plaintiff Phillips in the *Cranston* case maintained that he had contacted plaintiffs Ottman and Mesick but he appeared to contradict himself during the hearings on collusion and inadequacy of representation:

"Q. Now, when was the first occasion that you met with the other plaintiffs concerning this case? A. As a group, I think prior to the fall trial. I had talked to Mr. Cranston on the phone about it, but I hadn't attended any meetings."

* * * *

"Q. Now, did you – when was it that you first discussed the litigation with Mr. Mesick? A. Oh,

probably a year ago. I couldn't begin to say the date, but I would say about a year ago.

Q. Well, now, how far before the trial in October of 1967 had you discussed it with Mr. Mesick? A. Well, long enough to get his approval and inform Mr. Cranston that they were willing to have their names used.

Q. Well, now, I didn't ask you about any other individual. I was asking about Mr. Mesick. *Have you ever had any meeting with Mr. Mesick and Mr. Ottman, together, and yourself?* A. No, I have not.

Q. And do you have any financial contract or understanding of any nature with Mr. Weatherwax, your attorney, concerning the expenses and the fees of this proceeding? A. No, I do not.

Q. Did you have any conversation with Mr. Mesick or Mr. Ottman on this subject? A. *I don't know.* We might have, generally, talked about it, because there is always costs involved in such things, but nothing definite.

Q. Now, what do you mean 'costs involved in such things'? Wouldn't this be a logical subject that would be immediately brought up? A. Well, yes. *As I say, it was a subject that was brought up,* but I don't know that we arrived at any conclusion.

Q. Are you saying that Mr. Mesick or Mr. Ottman would enter into a situation of this nature without knowing anything about the financial arrangements? A. Well, as I got involved in it, we were asked to participate as the intermediate group, and I think we all jointly concluded that Mr. Cranston and Mr. Weatherwax were handling the case and we would lend our assistance because of our location.

Q. Now, when you say 'we', did somebody ask you and Mr. Ottman and Mr. Mesick in a group?
A. Well, I was asked individually, and I think the others were, also.

Q. But you don't know that for a fact; do you?
A. *Well, I never asked them.*"

The record in the *Cranston* case discloses the following testimony by the plaintiff Cranston on the question of his fitness to represent the class plaintiffs:

"Q. Now, you feel very strongly, Mr. Cranston, about the nearby differential of the Connecticut Milk Order? A. What do you mean 'feel very strongly'?

Q. Against it. A. Against it, yes.

Q. And yet, you didn't notify anybody about the litigation, other than Mr. Ottman, Mr. Phillips, and Mr. Mesick? A. No.

Q. And you feel that you can adequately and fairly represent the plaintiffs' class in this suit under the circumstances? A. Well, I believe that was a ruling in this Court.

MR. WEATHERWAX: Now, Harold, don't go into that. He just asked you a simple question. Now, answer the question as best you can.

THE WITNESS: Yes.

MR. WEATHERWAX: Okay. That takes care of that.

BY MR. RYAN:

Q. Now, isn't it a fact, Mr. Cranston, that you are not even a milk producer at this time?
A. This is true." (T. 270-71).

The witness Seremet, CMPA manager for 26 years, testified as follows concerning the plaintiff Cranston during the collusion hearings:

> "Q. Do you know whether or not he was regarded, in his locality, as a spokesman *against* the nearby differentials? A. He had initiated some action, previously, with regard to the nearby differentials.
>
> Q. Can you tell us approximately when Mr. Cranston had initiated previous action? A. There was a petition signed by he and others with regard to nearby differential *expansion* in the Federal Order hearings, but I can't remember the dates."

Witness Alexander Marbot, a non-nearby producer, testified as follows during the *Cranston* collusion hearings:

> "Q. Now, have you ever had any conversation with any individual concerning the nearby differential of the Connecticut Milk Marketing Order? A. Yes, with Ted Blakely and a man by the name of Frank Bragg. That was a long while.
>
> Q. Now, will you identify those individuals? A. Well, Frank Bragg is the field man, and I don't know what Blakely is. I believe he is a trouble shooter of some sort, but I just don't know.
>
> Q. With whom? A. Beg pardon?
>
> Q. With what organization? A. With C.M.P.A.
>
> Q. All right. Now, when did this conversation occur? A. I believe it was January the 21st, the first time they approached me to sue for the differential, and to sue in Connecticut, that they would break the differentials but hold the Federal

order in Connecticut, and they approached me three times on this.

Q. Now, when you say 'break', they told you that they would 'break the differentials', what do you mean by that? A. I asked them what they meant by that, and *they said I would get 46 cents a hundred more for my milk.*

Q. If you brought this case? A. To court, and, after the third time, I told them I wanted to see my lawyer and talk it over with him before I would say yes or no. And then they thought they might be back that day or the next day, and I haven't seen them since. I have seen Bragg, as field man, and Blakely I haven't seen since, and, later, I heard Cranston and the other boys were opening a suit.

Q. Now, I want you to state this again if you would. Now, you are stating that these CMPA personnel or officials asked you to bring this case in the State of Connecticut and that it would result in the breaking of the differentials, that you would receive 46 cents more for your milk; is that correct? A. That's right."

* * * *

Under cross-examination by Mr. Weatherwax, the witness testified (T. 157) that Mr. Blakely had stated:

"A. * * * 'Yes, Marbot, it won't cost you one penny. We will pay the attorney that we appoint to you. If he loses, we pay him. If he wins, it will come out of the escrow account. It won't cost you one penny,' is what they told me, but, when I wanted to see my lawyer, that was the end of it."

The witness Seremet also testified as follows concerning the institution of the *Cranston* suit on February 9, 1967:

"Q. Now, did you, at any time, talk to Harold Cranston, either on the telephone or in person, concerning the institution of this action? A. Yes.

Q. And could you tell me when that was? A. Sometime the latter part of January.

Q. Well, would you be a little more specific as to the date? A. If I recollect, it would be around the 27th of January.

Q. And was that in person or by telephone? A. By telephone, sir.

* * * *

Q. In January of 1967, when you telephoned Mr. Cranston, what was the subject of your conversation at that time? A. As I recall it, it would concern itself with the nearby differential that was a result of the *Blair* decision.

* * * *

Q. And how would the *Blair* case enter into your contacting these particular producers? A. As I recall, the *Blair* case ruled out the nearby differentials in the New York Order. There was an action taken in the Boston, the Massachusetts–Rhode Island Order, on the nearby differentials, and it occurred to us that action in the Connecticut Order might be well worth taking * * * ."

"Q. Now, did you ask Mr. Cranston if he would institute a suit at that time? A. Asked him if he would be interested in instituting a suit, he and others." (T. 173; see also 167-168).

* * * *

Q. Now, you recommended an attorney, at that time, for Mr. Cranston to consult? A. Yes. We had – the association or I had a name of an

attorney in Albany by the name of Brearton, that was recommended as a potential attorney to handle the case.

Q. Now, who recommended Mr. Brearton? A. Mr. Conard.

Q. Mr. Conard; and is Mr. Conard counsel for your association? A. Yes."

* * * *

"Q. Now, when did Mr. Conard recommend to you Mr. Brearton, prior to your making the telephone call to Mr. Cranston? A. It would be prior to the call; how soon prior to that, I really can't recall, at this point.

Q. Well, what were – where was that – where did that conversation take place? A. (No Response)

* * * *

Q. And did Mr. Cranston accept the offer of Mr. Brearton's services? A. Of what?

Q. Did Mr. Cranston accept your offer of Mr. Brearton's services, as the prospective Plaintiff's attorney? A. I don't recall that he accepted. He suggested another attorney.

Q. And what was your response when he suggested another attorney? A. That we would like to check on his reputation and see what kind of an attorney he was, if he was capable.

Q. And did you subsequently do that? A. Yes.

Q. And how soon after your telephone call with Mr. Cranston was that done? A. I don't recall, at this point.

Q. Did Mr. Cranston identify the attorney that he desired to have represent him? A. Yes.

Q. And who was that? A. Weatherwax."

* * * *

"Q. Now, has Mr. Brearton ever handled any milk case or milk litigation, to your knowledge? A. No, I do not know.

Q. But you testified you were desirous of furnishing a competent attorney? A. Yes, sir."

* * * *

"Q. Well, you have indicated that you told Mr. Cranston that you wanted to check out Mr. Weatherwax to see whether he was competent and so forth. Now, how long after that was Mr. Cranston told that it was okay to proceed with a suit and to contact Mr. Weatherwax? In other words, was this in a matter of a few days or weeks? A. It would have been in a matter of a few days."

* * * *

"Q. Mr. Seremet, other than yourself and Mr. Conard, I believe you testified Mr. Longo – were there any other individuals that were aware of your telephone call to Mr. Cranston, in the association? A. I don't recall.

Q. You don't recall? A. No.

Q. In other words, was there any special meeting called for this purpose, or was this an individual thing on the part of these persons? "

* * * *

"A. It has been a board policy to defend the nearby differentials and the Connecticut price, and this is an action in line with that policy.

Q. That wasn't my question, Mr. Seremet. Was there any meeting that preceded your telephone call to Mr. Cranston? A. *I know of no meeting*, other than the district meetings that we had been holding at that time of the year in all of our districts.

Q. Those district meetings are concerned with many matters, are they not? A. Correct.

Q. Now, what I am asking is, was there any specific meeting that preceded your telephone call to Mr. Cranston? A. *I don't recall any specific meeting, sir.*

Q. Are you stating this was individual action, by yourself?

MR. GOLDBLOOM: Objection, Your Honor.

THE COURT: Sustained.

BY MR. RYAN:

Q. Do you know of any formal meeting that was called with respect to the institution of this action by Mr. Cranston?

MR. GOLDBLOOM: I object.

THE COURT: Sustained. You have asked that about three different ways."

* * * *

"Q. Now, did you indicate anything concerning payment of expenses of the lawsuit? A. Yes, we discussed the problem.

Q. In what specific manner? A. In this area, that the nearby producers were going to be supplied with counsel to defend their position, or we would assume the expenses of that, and we would be willing – we, the association, would be willing to help in supplying the attorneys for the distant producers.

Q. And you would pay the fees of those two attorneys? A. Well, I don't know if that was mentioned as fees. Certainly, if distant producers won the case, that the escrow monies would probably take care of the expenses of the attorneys.

Q. Now, how do you know that to be a fact? A. I don't.

Q. In other words, if the attorney for the distant producers lost the case, he would be compensated by the association? A. Reasonable expenses would probably be compensated.

Q. And that includes an attorney's fee? A. I would think so, part of it." (T. 174-75).

* * * *

"Q. Well, the *Allen* decision was on June 15 of 1967. Now, did the Association attempt to intervene in that case? A. In the *Allen* case?

Q. Yes. A. Yes, we did, sir.

Q. And who was your attorney at that time? A. Mr. Reuben Hall and Mr. Conard.

Q. And did you have local counsel in Washington at that time? A. Probably through Mr. Hollman.

Q. Of Klasgbrunn & Hanes; Mr. Lawrence Hollman? A. I really don't know, at this point. It was Mr. Hall that the contact was made with, and through Mr. Conard.

Q. You did not, at that time, seek to obtain an attorney in the District of Columbia, yourself; is that correct? A. No.

Q. Now, prior to the *Blair* decision, had any producers ever indicated an interest in bringing any legal action to challenge the nearby differential of the Connecticut Order? A. I don't know about legal action. There certainly were producers who had asked to have Federal order changes made, to change the –

Q. Were there not many objections by distant producers to the differential? A. There were some objections; yes, sir.

Q. At that time, did you offer to provide an attorney or to attempt to institute any suit in behalf of those producers, prior to the *Blair* or *Allen* decisions? A. This was in connection with Federal orders. I don't know of any other legal action that was taken.

Q. No, I realize that, but, prior to the *Blair* decision and the *Allen* decision, did you ever attempt to accommodate your distant members with respect to institution of any legal action, to challenge the nearby differential of the Connecticut Order? A. No."

* * * *

"Q. You stated that your distant members did evidence opposition to the differential prior to the Blair case. A. There were some distant producers that wanted to be included in the nearby zones, yes.

Q. And you – did you, at that time, take any action to provide them with an attorney or expenses or anything to contest the particular differential at that time? A. I don't recall that we had."

* * * *

"Q. And didn't you feel that these producers that you desired were competent to take their own legal steps? A. I didn't question whether they would desire it.

Q. But you did not wait to see whether they would do so, is that correct, after the *Blair* decision? A. There was a period of time where we waited, yes."

The witness Seremet testified as follows under examination by CMPA counsel:

"Q. Now, where – Mr. Seremet, whether Mr. Cranston chose Mr. Weatherwax for his lawyer or any other member of the bar, did you agree, by words or inference, to pay Mr. Weatherwax or any lawyer, any sum of money whatsoever? A. I told Mr. Cranston that we would help in the expenses – a reasonable amount in the expense of the defense of their position."

* * * *

"Q. All right. Now, I am going to ask my question again. Did you, at any time, by words or inference, say or suggest that you would pay any money to Mr. Weatherwax or any other member of the bar? A. I am not positive.

Q. *I am only talking about the conversation with Mr. Cranston.* Did you, sir, say or suggest that you would pay any money to Mr. Weatherwax or any member of the bar? A. I don't recall that; no, sir.

Q. So you believe that you did not say it? A. I did not."

The plaintiff Cranston, a CMPA member like the other two original plaintiffs testified as follows at the collusion hearings:

BY MR. RYAN:

"Q. Now, what was the balance of the conversation, Mr. Cranston? A. Well, he asked if I had a lawyer. I said I did – we did.

Q. Now, who is 'we'? A. Mr. Carlson, Mr. French, with whom I had discussed this.

Q. And you had discussed it with them when? A. On different occasions.

Q. Well now – A. Over the past several years, none of us have been happy with this.

Q. I realize that, Mr. Cranston, but you have now testified that you told – if my recollection is correct, that you told Mr. Seremet that 'We had a lawyer.' A. Yes.

* * * *

Q. When did yourself, Mr. Carlson and Mr. French obtain a lawyer? A. I can't remember the exact date.

Q. Well, was it prior or subsequent to the time of Mr. Seremet's telephone call, concerning which you are now testifying? A. As I stated before I have talked with John (Weatherwax) because he is a neighbor –

Q. Yes. A. – Mr. Weatherwax, on many occasions, about the discrepancies that exist in the payments. We were agreed that it was a ridiculous situation.

MR. RYAN: Your Honor, the witness is not being responsive to the question at all.

THE COURT: I believe he is. Mr. Ryan's remark, construed as a motion to strike, is denied.

BY MR. RYAN:

Q. When, Mr. Cranston, did you, Mr. Carlson and Mr. French obtain the services of a lawyer; was it prior or subsequent to this telephone call? A. It was subsequent."

* * * *

"Q. Now, when did you first go to Mr. Weatherwax for the purpose of instituting this litigation? A. I can't remember the date.

Q. Now, how much time elapsed from the time that you, Mr. Carlson and Mr. French consulted Mr. Weatherwax and the time that this suit was filed, approximately? A. I can't remember that exactly. I am sorry, but I didn't make a record of any of this stuff.

Q. Well, could you tell me – A. I didn't think it was important at the time.

Q. Well, could you tell me whether it was a matter of days, weeks, months, or do you have any approximate estimate? A. A week, more or less, maybe.

Q. Pardon me? A. A week, more or less, maybe. I don't know exactly.

Q. And did you all go to Mr. Weatherwax's office to consult him, or what were the circumstances? A. If you mean Mr. Carlson, Mr. French and myself, yes, we did.

Q. And how did you go: together by automobile, one automobile, or separately, or what? A. I believe there were two carloads of us – two cars of us.

Q. And was anybody with you, at that time, other than yourself, Mr. Carlson and Mr. French? A. Yes.

Q. Could you state who they were, please? A. Mr. Longo.

Q. And who is Mr. Longo? A. He is the President of the CMPA.

Q. And was there anybody else with you? A. I believe Frank Bragg.

Q. And who is Mr. Frank Bragg? A. He is a fieldman with the CMPA.

Q. And was there anybody else with you? A. I think Ted Blakely was there.

Q. And who is Mr. Blakely? A. Well, I don't know what his exact position is. He works for the CMPA.

Q. And was there anybody else there? A. No, not in Mr. Weatherwax's office.

Q. No, that went with you to Mr. Weatherwax's office. Did not, in fact, Mr. Conard and another attorney go with you? A. Mr. Conard never went to Mr. Weatherwax's office with us.

Q. Did he come to your home? A. He came to my home, yes.

Q. In the company of the other individuals? A. That is correct.

Q. And did he go into Troy with you? A. He rode down to Troy with us, yes."

* * * *

"Q. And during your conversation with Mr. Seremet, your telephonic conversation that you testified to, was anything else discussed, at that time, concerning payment of fees or the expenses – the expenses or fees of the case? A. I believe Mr. Seremet explained that.

* * * *

"Q. Well, now, I am asking the question, what are the financial arrangements in the event that the plaintiffs do not prevail in this litigation? A. There is no written agreement that I know of.

Q. Well – excuse me. A. We expect to win the case, but, in the event we don't, I suppose we

will be submitted a bill by Mr. Weatherwax, *which we will promptly resubmit to the CMPA* and hope that they come through on their word. That is all I know."

* * * *

The plaintiff Cranston testified as follows under examination by his own attorney:

BY MR. WEATHERWAX:

"Q. And as a – and then, the question came up that, in the event that the suit went against the plaintiffs – finally went against the plaintiffs that only in that event would the CMPA take care of the minority; is that not it?

MR. CRANSTON: This is substantially correct."

The record reflects the following testimony by the plaintiff French when examined by his own attorney:

BY MR. WEATHERWAX:

"Q. Do you recall meeting at Mr. Cranston's home on February 3rd, 1967, *for the purpose of discussing the bringing of this action?* A. The first part of February. I don't know whether it was the 3rd or not.

Q. Do you remember, at that time, some gentlemen from Connecticut came to Mr. Cranston's home? A. Yes.

Q. And do you remember, later on, you people coming to my office? A. Yes.

Q. Now, do you see Mr. Conard, the lawyer, the gentleman sitting in the third from the end – this end. Did he call, with some other CMPA members, at Mr. Cranston's home on that day? A. Yes."

* * * *

On cross-examination plaintiff French testified as follows in respect to the meeting of February 3, 1967 (351-52):

"Q. Mr. French, on February 3, 1967, you attended a meeting at Mr. Cranston's home? A. We met at Mr. Cranston's home, yes.

Q. Did you actually have a meeting on that date at his home? A. Well, we met there and talked for awhile, while we were waiting to go down to Mr. Weatherwax's office.

Q. But, as a meeting as such, was that actually a meeting, or was it a gathering point? A. It was – I would say it was a gathering point.

Q. Pardon me, sir? A. I would say it was a gathering point.

Q. Yes. Now, prior to that time, had you ever attended any meeting at Mr. Cranston's home concerning the nearby differentials or the institution of this action? A. No; I didn't at his home.

Q. Had you attended any meeting or conference at Mr. Weatherwax's office prior to the date of February 3, 1967? A. No.

Q. Are you personally obligated in any way, concerning any of the financial aspects of this case, as far as expenses or attorney fees are concerned, sir? A. No."

* * * *

"Q. Now, did you attend the trial, sir? A. Just the first day.

Q. And have you ever read any of the pleadings that were filed? A. No, I didn't." (T. 354).

The plaintiff Phillips testified as follows during the *Cranston* collusion hearings:

"Q. And do you have any financial contract or understanding of any nature with Mr. Weatherwax, your attorney, concerning the expenses and fees of this proceeding? A. No, I do not."

* * * *

"Q. Now, have you ever been in the office of Mr. Weatherwax, your attorney, other than on February 3rd, 1967? A. I think I mentioned, awhile ago, that I wasn't in there on February 3rd.

Q. Yes, you did. I am very sorry, sir. Have you ever been in Mr. Weatherwax's office? A. No, I have not.

Q. Have you ever received any of the pleadings that have been filed in this action? A. I read the summary.

Q. What are you referring to when you say 'summary', sir? A. Of the hearing.

Q. Do you mean after the trial? A. Yes.

Q. Had you ever read anything prior to the trial? A. No."

* * * *

Q. And you attended the trial, you say, for one day. Was that your testimony, sir? A. I did attend the trial for one day.

"Q. Yes, and how many days did the trial last? A. Well, I heard them mention it here. I was here one day, and then I had to go to Syracuse. When I got back, it was over.

Q. And how long were you in Syracuse?
A. Two days.

Q. And you attended the trial but one day, but you wanted Mr. Mesick and Mr. Ottman to attend the trial; is that correct? A. Yes."

The plaintiff Carlson testified that he met with the others at Cranston's home on February 3, 1967, before proceeding to Mr. Weatherwax's office, and he also testified as follows when examined by applicants' attorney:

> "Q. Sir, do you have any agreement with your attorney, Mr. Weatherwax, concerning payment of his fee or the expenses – A. No, sir.
>
> Q. – for this action? A. No, sir."

The following is a portion of the testimony of Louis Longo, CMPA President and owner of a 360-acre "nearby" farm in Connecticut:

> "Q. Yes. Now, did you, at that time, meet with any distant producers or with any attorney that represented distant producers in that litigation? A. As far as the *Allen* litigation and the *Blair*?
>
> Q. Yes. A. I don't recall any meetings held specifically for that purpose, no.
>
> Q. But did you take any steps to assist your distant or non-nearby members in respect to presenting a position in that litigation, either *Blair* or *Allen*? A. Did we take any steps to assist?
>
> Q. Yes, your non-nearby or distant producers in putting forth a position in that litigation? A. First – well, first we had no – I don't follow this question of assisting them.
>
> Q. You have already testified that the Association filed a brief amicus curiae in the *Blair* case – A. That is right.
>
> Q. – that they attempted to intervene in the *Allen* case, in both instances, in behalf of nearby producers and continuation of the differentials.

A. May I say it has been entirely our feeling in defending the nearby differential that we were assisting our distant producers.

Q. That is not my question. Did you, in fact, take no action to assist distant and – A. It was our feeling that we were assisting the distant producers.

Q. You still haven't responded to my question. * * * Did you, in fact, authorize any attorney to take any steps, in either *Blair* or *Allen*, to represent the position that these current plaintiffs espouse in this action – in the *Blair* and *Allen* litigation.
A. Here again, no, not directly.

Q. And you have testified that there were objections, previously, to this nearby differential by producers – as you call them, up-country producers. Did you take any steps, at that time, to assist those producers? A. Yes. We based the objections on the fact that the producers were not acquainted with what constituted provisions for orderly marketing as far as the ordinary –

Q. I am not interested in your opinion of orderly marketing. A. It isn't my opinion.

Q. Did you take any steps that would constitute a challenge to this differential prior to the filing of this action? A. No."

* * * *

"Q. Now, do you feel that you have to pursue the question of the ability of any of your members to bring a legal action and to consult an attorney? A. Well, it isn't a matter of the individual member, so much as the entire membership, itself. I think that the Association would pursue any matter in the same – with the same effect and in the same manner."

* * * *

"Q. Did you ever come to my office, Mr. Longo? A. No, I have never been to your office.

Q. Did you ever attempt to contact me in any manner, whatsoever? A. No.

Q. Did any of your attorneys, prior to institution of either the *Blair* or *Allen* cases? A. No, none that I know of.

Q. Now, what other dairy farmers, other than the three that we have named, actually took part in any meeting or evidenced any specific requests for any legal action in this area? (Witness previously testified Cranston and others threatened action at meetings) A. Well, I don't know their names specifically. There were a number of dairy farmers."

* * * *

"Q. And you own a dairy farm in the State of Connecticut, do you not? A. That's right.

Q. And you would be affected by the elimination of the differential; would you not? A. No more than any other producer in our organization, distant or far.

Q. Well, you would be affected; would you not? A. By the fact of disorderly marketing that would be created.

Q. That is not my question. You have been making speeches here. You would be affected financially, adversely, by the elimination? A. Yes. I would be affected in the same proportion as all other individuals."

Witness Kenneth Herrington testified as follows as to plaintiff Carlson during the collusion hearings:

"* * * Then I asked – I went to visit one of them, a Mr. Carlson, because I – this was after the trial

had taken place. I visited Mr. Carlson and asked him what he thought of it or he came and asked to get involved, or what happened, and he told me the field man from CMPA, a Mr. Bragg, had asked him to be a plaintiff in the case, and I asked him if he was bearing any of the expenses, and he said, 'No, Mr. Bragg, the field man, said we didn't have to worry about any of the expenses, that CMPA was bearing the expenses of any lawyer fees', and I said, 'Well,' – then, he said, 'Well, what made me mad at the CMPA is that they joined the side of the Government after they came to us and asked us to have the case', and I said – at this time, I said, 'Well, don't you feel something is wrong, they offered to pay the expenses of your lawyer, then they are on the other side', and he said, 'Well, it certainly doesn't look right,' but he said, 'I am not too happy with CMPA for doing this'."

The witness testified as follows under cross-examination by Mr. Weatherwax:

"Q. No, I said dismissed. Why do you believe it should be dismissed? A. Because of the way that it all started; the way that it was solicited; the way that Mr. Cranston had talked to me, told me, anyway, that it was brought up by CMPA, the fees were to pay the lawyers who were being paid by CMPA. He seems to have lost all control himself."

Another non-nearby producer, Paul Schmidt, stated as follows concerning his understanding that the CMPA was representing non-nearby producers who desired to eliminate the nearby differential:

"Your Honor, I am not acquainted with Court procedures, and I can't hear too good, so, if I step out of line, I need some guidelines. My name is Paul Schmidt. I am a CMPA member. I am not for or

against anything. I would like more information. I was under the impression CMPA was representing us outside producers, and the only notice I had to appear was what I read in the CMPA Bulletin. I received no formal notice, but, lately, I heard the CMPA is representing the nearby producers, so, without any disrespect, I would like to know where I stand and if I am represented, to make a long story short." (T. 50)

On this same subject, an affidavit filed in *Cranston* related the following conversation with plaintiff Cranston prior to the hearings on collusion and inadequacy of representation:*

---

* The farmers questioning the inadequacy of representation and collusion in *Cranston* were not allowed to take depositions or discovery, and, in fact, were enjoined by Attorney Conard from taking such depositions, including his own. They could not examine such parties and counsel without making the same their own witnesses, the opposing counsel then cross-examining his own client by leading questions to establish favorable information. Applicants were not allowed to ask any questions concerning the merits, and the record of the previous trial was unavailable when their counsel made two separate 800-mile round trips to inspect the record in order to prepare for the collusion hearings. The record was available for inspection after persistent inquiry for only 20 minutes on the second trip, and applicants' counsel was informed that he could not look at it any longer because of the unavailability of a government attorney to watch as counsel examined the record. No non-nearby farmer was able to intervene in *Cranston,* and a motion for disqualification of the presiding judge (Timbers, J.) was denied on the ground, among others, that the movants were merely applicants for intervention and their application untimely, although most applicants were unaware of the pendency of the suit until advised of same on April 24, 1968, 14 months after filing of the complaint. Relief in the form of mandamus was also requested by three applicants in the Second Circuit but the Applications were denied as not being a substitute for appeal. Appeals are pending in that court but will not be at issue until June 1969 because of delay of the parties in the main suit.

"MR. RYAN: If that case had been brought down here, there wouldn't have been any problem that I could see for the court here has ruled twice against the differential –

MR. CRANSTON: Well, that's why they didn't want it brought down there. They wanted it tried up here.

MR. RYAN: Well, that's why I was trying to see to what extent they were involved in bringing it up there because –

MR. CRANSTON: They brought it because they knew someone was going to bring it. They wanted to be able to control it. By bringing it first, why, they could. And they could say where it was going to be tried – ".

* * * *

MR. RYAN: The other side isn't really supposed to be involved, and it casts an unwholesome atmosphere over the litigation, the courts feel, when that's so, you see.

MR. CRANSTON: Well, that's right. That's right. And I felt all along they were playing with fire but they were desperate.

MR. RYAN: Well, that's what I mean. You see, they lost two cases and that's their last shot. And they are desperate, and when you're desperate you take desperate measures.

MR. CRANSTON: That's true, and that's what they did."

APPENDIX B

The following Response filed in the court below illustrates the contrasting treatment in this case and the *Cranston* suit:

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

FREDERICK T. ZUBER, ET AL., *Appellants,*	)	
v.	)	
RUSSELL ALLEN, ET AL., *Appellees.*	)	No. 21, 141

RESPONSE TO APPELLANTS' OPPOSITION TO APPELLEES' BILL OF COSTS

The appellees respectfully say as follows in response to the appellants' Response (Opposition) to the appellees' bill of costs:

1. The appellees regret the necessity for this Response to an unnecessary Opposition to the appellees' bill of costs. They believe that counsel should attempt to resolve such matters in good faith, and they are of the respectful opinion that minutiae of this nature should not burden the Court, the Clerk, or themselves.

2. The appellees note that appellants were denied intervention by the district court and that this Court denied their motion for summary reversal of such denial of intervention. The appellants were only allowed to enter this case for the purpose of taking an appeal, in that it did not appear that the defendant Freeman was going to appeal the lower court's judgment. Under such circumstances, it would appear that appellants take the

record as they find it, particularly when they were given repeated opportunities to bring any defenses, objections, or other matters to the attention of the district court as *amicus curiae* in the case. Additionally, defendant Freeman never really objected below to any of the material to which these appellants object, nor did appellant *Freeman* object to the inclusion of such material into the Joint Appendix that he utilized in No. 21,308, consolidated herewith, *without contributing anything to the cost thereof.* Under these circumstances, it is respectfully submitted that neither appellant has standing or ground for opposing the appellees bill of costs. If these appellants have any quarrel, it is properly with the appellant *Freeman* and not with the appellees.

3. The appellees believe that it is particularly indefensible for these appellants to burden the appellees, the Clerk, and the Court with a proposal for the apportionment of costs of the appendix that is patently improper and unbecoming of counsel, in that appellants state as follows in paragraph (e) on pages 3 and 4 of their Opposition:

> "(e) If the costs of printing the 100 pages is *assumed* to be roughly proportionate to the total cost of printing the Joint Appendix, then Appellees should bear in any event the cost of printing the 100 pages in the amount of $985.60 (100/323 x $3,183.47 = $985.60). The taxing of the *remaining* costs of printing the Joint Appendix should await disposition by the Supreme Court of Appellants' petition for certiorari."

It is clear that appellants seek to evade printing costs by means of an improper assumption and through the above inventive "computation". The 100 pages to which the appellants refer (p. 223-323) is almost all straight printing and virtually devoid of tabular and like

material that was extensively designated by the appellants. (*Pages 199-206 of the appendix is a good example*). Appellants' printer charges $6.90 per page, but the appellants seek to charge appellees $9.86 per page and to force the appellees to bear the cost of covers, tabular material, etc., that is the responsibility of appellants. This proposal is deemed unworthy of the time of appellees, the Clerk, and the Court, and it bears great resemblance to the tactic of appellant Freeman in No. 21,308 wherein he delayed his appeal and utilized the joint appendix filed herein.

4. The letters on file disclose that appellees refused to print cross-examination with the direct testimony of witnesses in the joint appendix and insisted that such direct testimony and cross-examination be printed in separate appendices. After appellees brought this to the attention of the Court, the appellants then agreed to print such matter in logical sequence and to pay for the printing of the administrative records. They subsequently reneged on this promise after the printing was completed in order to avoid payment therefore, and the reason given for such disavowal was so patently inaccurate that it cast a further adverse reflection on appellants. This resulted in appellants' printer billing the appellees for material that the appellants had agreed to print at their expense.

5. Additionally, the printing of most of the 100 pages to which the appellants refer was rendered necessary in order to prevent misstatements to this Court by both appellants, and an examination of the appendix evidences this obvious fact. For instance, pages 236-244 set out major admissions contained in the Secretary's brief filed in the *Blair* case, including references to the milk order provision involved in this case. Such brief, filed as an exhibit below, also acknowledges that the Secretary had always interpreted or regarded a "market" differential as being identical with that defined in the Congressional

reports that were quoted by the Secretary in said brief, although both appellants disaffirmed such "long-standing contemporaneous construction" of the provision of the Act in this case.

Page 263 sets forth a "Designation" of the pertinent pages of the promulgation hearing record relating to the nearby differential. Appellants cited many matters in this Court that they refused to bring before the lower court through a brief *amicus curiae*, and the said designation of the pages of the administrative record was made to preclude the appellants from claiming in this Court that they had no real opportunity to file such brief below because of lack of the administrative record designation. Pages 273-74 of the appendix sets forth a letter to appellants' counsel advising that appellees consent to the filing of such a brief, and page 272 sets forth a letter in which appellees inquired as to whether appellant Freeman regarded any other administrative hearing record as necessary in the district court for decision of the case. (Both appellants later maintained in this Court that all of the necessary hearing records were not before the district court.).

The said letter also referred to the filing of a part of the Economic Brief of the USDA in the district court, and the 1937 brief related to the Government's conception of proper equalization and marketwide pooling of milk. This relevant material was accepted without objection, and it is included in the appendix at pages 318-23 thereof.

The summaries of the early administrative hearing records are entirely factual, rather than argumentative, and no objection was ever made to their filing in the district court. Moreover, their accuracy was underscored by the fact that the defendant's attorneys refused to file such early administrative records after being served with such summaries *and after the certification of such administrative records by the Secretary.* This latter fact is shown by the affidavit on page 306 of the Appendix that the administrative records were certified and delivered to government counsel by the Office of the Hearing Clerk, USDA. The said 100

pages of the Appendix also lists an *Opposition* to a motion (pp. 244-62) that evidences the inconsistency of the defendant's position in seeking to hold the proceedings in abeyance after he had advised months before that he was ready for final hearing. The matters therein were directly relevant to the very arguments made by both appellants concerning "primary jurisdiction", administrative remedies, etc., and the defendant's motion to which such Opposition relates is also set forth on pages 48-50 of the Joint Appendix – the appellants not objecting to this designation or others in the other part of the Appendix at this time. The memoranda or points and authorities to which appellants object is found in two paragraphs on pages 263-64 of the Appendix, consisting of excerpts from the *defendant's* points and authorities and which sets forth relevant factual data rather than argument. In view of the fact that the appellants were contesting the basis for the lower court's action, the appellees designated their Reply to the defendant's Opposition to a proposed Order granting summary judgment. The only other matter contained in pages 221-323 of the Appendix is the *defendant's* Opposition to the motion for preliminary injunction, the plaintiffs' Motion for Summary Judgment and Statement of Material Facts as to Which There Is No Genuine Issue, and the plaintiffs' points and authorities supporting the aforesaid motion. Such points and authorities cover but three pages of the appendix, and the appellees are willing to sustain the cost of this printing for the reason that such material was furnished to the printer in error. It pertains to the *Blair* case, and this fact is evident from a reading of such material and the unnatural manner in which it ends.

It should be noted that the record certified by the appellant *Freeman* contained numerous briefs or memoranda filed at the administrative hearings, and both appellants and the Court refer to such matter. The necessity and relevancy of all of the material printed at pages

221-323 of the appendix is apparent from a reading of the briefs of both appellants, in that virtually all of the matters designated by appellees are referred to in such briefs. (The early Boston milk orders, the entry of summary judgment in the lower court on the basis of *Blair*, the entry of the preliminary injunction and orders regarding escrow of the differential payments, and other matters are all referred to in appellants' briefs. Not one factual error was pointed out at any time in respect to the summaries of the administrative records relating to the nearby differential, and the appellants' complaint is that such summaries precluded an inaccurate presentation of the contents of such administrative records and resulted in the appellant Freeman's decision not to file such certified record under those circumstances. Appellants then cited briefs in other cases in a totally inaccurate manner in an attempt to establish their contentions that could no longer be presented through the administrative records that appellant Freeman certified but did not file.). The appellees respectfully submit that the relevant criterion in respect to the printing of any material in the appendix is whether it is necessary or helpful to a correct determination of the appeal, and both appellants fail to mention this factor for obvious reasons.

6. The appellees respectfully say that the appellants are totally in error in requesting that costs not be taxed against them until disposition of the intended application for certiorari and Rule 39(d), F.R. App. Proc., states as follows:

> "The clerk *shall* prepare and certify an itemized statement of costs taxed in the court of appeals *for insertion* in the mandate."

Whether the mandate is actually stayed is a separate question, and the possible application for a writ of certiorari is not ground for qualification of the Rule or

for delay in the taxing of costs. The Rules are statutory in nature and unlike the local court rules where discretion is often utilized in applying the same.

The appellees again say that they regret that the Court and the Clerk, as well as themselves, are unnecessarily burdened with this type of matter, particularly after the Court's exhaustive treatment of the appeal and its attempt to effectuate an equitable disposition thereof that would preclude additional litigation.

Wherefore, appellees respectfully request that they be accorded their costs through immediate taxation of the same against the appellants and in conformity with the amounts that they were forced to incur for the expenses of the appellants' appeals.

Respectfully,

/s/ Charles P. Ryan

Charles P. Ryan
Attorney for Appellees
400 Prudential Bldg.
Washington 5, D.C. 20005

A true copy:
Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: /s/ Maria L. Harrison, Deputy Clerk